No. 85-122 (2)

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

FIRST CITIZENS BANK OF BILLINGS, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether congressional ratification of the Equal Employment Opportunity Commission's power to enforce the Equal Pay Act, 29 U.S.C. 206(d), resolves petitioner's challenge to the Commission's enforcement authority.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-20) is reported at 758 F.2d 397. The memorandum opinion of the district court (Pet. App. 23-71) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 16, 1985. The petition for a writ of certiorari was filed on July 12, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 1978, President Carter approved Reorganization Plan No. 1, 43 Fed. Reg. 19807, which transferred administration and enforcement of the Equal Pay Act (EPA), 29 U.S.C. 206(d), from the Department of Labor to the Equal Employment Opportunity Commission (EEOC). See 92 Stat. 3781 *et seq.* The President took this action pursuant

to the Reorganization Act of 1977, 5 U.S.C. 901 *et seq.*, which contained a one-house legislative veto provision. See 5 U.S.C. 906.

In 1980, the EEOC filed this action against petitioner First Citizens Bank of Billings. The EEOC charged that petitioner had violated the EPA by paying men higher wages than women working in the same positions. In 1983, the district court ruled that petitioner had willfully violated the EPA with respect to the compensation of female tellers, proof operators, and installment loan officers (Pet. App. 22-71). The court awarded $75,007.34 in damages (*id.* at 22) but later reduced the award to $13,188.88 (*id.* at 21). The EEOC appealed from the reduction of damages.

Shortly after the district court's original decision, this Court decided *INS* v. *Chadha,* 462 U.S. 919 (1983), holding unconstitutional the legislative veto provisions contained in Section 244(c)(1) of the Immigration and Nationality Act, 8 U.S.C. 1254(c)(1). Petitioner, relying on *Chadha,* argued through cross-appeal that the legislative veto provision of the Reorganization Act of 1977 was likewise unconstitutional, that reorganization plans taken pursuant to the Act were therefore invalid, and that the EEOC accordingly lacked authority to enforce the EPA. While petitioner's cross-appeal was pending, Congress enacted Public Law 98-532 (98 Stat. 2705) which ratified each reorganization plan implemented pursuant to the Reorganization Act of 1977.[1] The Ninth Circuit concluded that the curative statute

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[1]Public Law 98-532 (98 Stat. 2705) provides:

> Section 1. The Congress hereby ratifies and affirms as law each reorganization plan that has, prior to the date of enactment of this Act, been implemented pursuant to the provisions of chapter 9 of title 5, United States Code, or any predecessor Federal reorganization statute.
>
> Sec. 2. Any actions taken prior to the date of enactment of this Act pursuant to a reorganization plan that is ratified and affirmed

had rendered petitioner's claim moot, stating that "[t]he EEOC not only has authority to bring future [EPA] action, but has retroactive authority as well on any previous action it has brought" (Pet. App. 4). Petitioner seeks review of that ruling in this Court.[2]

ARGUMENT

The court of appeals correctly concluded that Public Law 98-532 resolved any doubts concerning the EEOC's authority to enforce the EPA. Its holding is consistent with the decisions of this Court and the decisions of other courts of appeals that have considered the issue. The court of appeals' ruling is applicable to only a limited number of suits that were brought prior to the enactment of Public Law 98-532 and, thus, does not present an issue of continuing importance that warrants this Court's review.

1. From 1978 to 1983, the EEOC exercised unchallenged authority, under President Carter's reorganization plan, to enforce the EPA. See, *e.g.*, *EEOC* v. *Central Kansas Medical Center*, 705 F.2d 1270 (10th Cir. 1983). This Court's decision in *Chadha*, however, spawned a number of challenges to the EEOC's enforcement authority. Employers, like petitioner, argued that the EEOC could not bring enforcement actions because the presidential reorganization plan was adopted pursuant to a statute containing an unconstitutional legislative veto provision. Two courts of appeals rejected that argument, concluding that the legislative veto provision was severable and therefore did not taint the otherwise lawful reorganization plan. See *Muller Optical Co.* v. *EEOC*, 743 F.2d 380 (6th Cir. 1984); *EEOC* v.

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by section 1 shall be considered to have been taken pursuant to a reorganization expressly approved by Act of Congress.

[2]The court of appeals also reinstated the $75,007.34 damage award (Pet. App. 20). Petitioner does not seek review of that determination.

Hernando Bank, Inc., 724 F.2d 1188 (5th Cir. 1984). However, the Second Circuit concluded that the provision was not severable and that the presidential reorganization plan transferring enforcement authority from the Department of Labor to the EEOC was therefore invalid. See *EEOC* v. *CBS, Inc.*, 743 F.2d 969 (2d Cir. 1984). However, the court especially noted that Congress could validate the plan through curative legislation. *Id.* at 975-976. Congress swiftly responded by enacting Public Law 98-532, which ratified the past reorganization plan. The Third Circuit later held that Public Law 98-532 resolved any doubts concerning the EEOC's enforcement authority. See *EEOC* v. *Westinghouse Electric Corp.*, 765 F.2d 389 (3d Cir. 1985); accord *Barrett* v. *Suffolk Transportation Services, Inc.*, 600 F. Supp. 81, 82 (E.D.N.Y. 1984).

The Ninth Circuit's rejection of petitioner's challenge to the EEOC's enforcement authority thus finds support in the decisions of three other courts of appeals. The Third Circuit has ruled, like the Ninth Circuit, that Public Law 98-532 resolves any doubt concerning that authority. The other two courts have ruled that the EEOC retained enforcement authority notwithstanding the Reorganization Act's legislative veto provision.

2. As these decisions demonstrate, the court of appeals correctly rejected petitioner's challenge to the EEOC's enforcement authority. Even if it is assumed that the EEOC's original enforcement authority was infirm under *Chadha*, Congress has undoubted authority to provide a retroactive cure for that infirmity. "It is well settled that Congress may, by enactment not otherwise inappropriate, 'ratify . . . acts which it might have authorized,' see *Mattingly* v. *District of Columbia*, 97 U.S. 687, 690, and give the force of law to official action unauthorized when taken." *Swayne & Hoyt, Ltd.* v. *United States*, 300 U.S.

297, 301-302 (1937). See, *e.g., EEOC* v. *Westinghouse Electric Corp.*, 765 F.2d at 391. Congress has properly exercised that power in the present case.

Petitioner challenges the congressional ratification of the EEOC's enforcement power on due process grounds, arguing that it deprives petitioner of "substantial rights" (Pet. 9). Petitioner contends that, prior to the enactment of Public Law 98-532, "the federal courts lacked statutory jurisdiction to hear the matter" (Pet. 9-10) and that the curative legislation therefore impairs "the right of a party to adjudication in a court of competent jurisdiction" (Pet. 13). However, petitioner is plainly mistaken. The question of jurisdiction turns on a court's power to hear the lawsuit. See, *e.g., Davis* v. *Passman,* 442 U.S. 228, 239 n.18 (1979). As noted in *Westinghouse,* the federal courts have had general federal question jurisdiction over EPA claims under 28 U.S.C. 1331 since the Act's inception. See 765 F.2d at 393. See also *Andrus* v. *Charlestone Stone Products Co.,* 436 U.S. 604, 607-608 n.6 (1978) (jurisdiction under 28 U.S.C 1331 is established by a "jurisdictionally correct" complaint alleging facts "sufficient to establish such jurisdiction"). Thus, an invalidation of the 1978 reorganization plan would not have deprived the court of power to hear EPA claims.[3]

Public Law 98-532 does not impinge upon petitioner's "substantive rights." It simply ratifies Congress's approval of the 1978 reorganization plan providing that the EEOC, rather than the Secretary of Labor, should enforce the

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[3]Petitioner premises its argument on the mistaken theory that a government agency can maintain federal court jurisdiction only through 28 U.S.C. 1345, which gives the district courts jurisdiction over suits "by any agency or officer thereof expressly authorized to sue by Act of Congress." Even if petitioner's theory were correct and, further, the EEOC lacked authority to bring the suit, Congress could correct any resulting jurisdictional defect during the course of litigation. See *United States* v. *Alabama,* 362 U.S. 602 (1960).

EPA. It "confirmed and approved the exercise by [one agency] of powers originally conferred on [another]." *Swayne & Hoyt, Ltd.* v. *United States,* 300 U.S. at 302 It thus represents " 'a curative statute aptly designed to remedy mistakes and defects in the administration of government where the remedy can be applied without injustice.' " *Ibid.* (quoting *Graham & Foster* v. *Goodcell,* 282 U.S. 409, 429 (1931)). The passage of Public Law 98-532 did not alter petitioner's obligation to comply with the EPA; it simply eliminated any doubt that the EEOC, rather than the the Secretary of Labor, was responsible for seeking correction of petitioner's infractions.

Petitioner mistakenly compares the instant case to *Forbes Pioneer Boat Line* v. *Board of Commissioners,* 258 U.S. 338 (1922). In *Forbes,* this Court held that a state legislature could not retroactively authorize the retention of a canal tax that the state had collected in error. The case thus involved " 'a bare attempt of the legislature retroactively to create liabilities for transactions . . . fully consummated in the past.' " *Swayne & Holt Ltd.,* 300 U.S. at 302 (quoting *Graham,* 282 U.S. at 429). By contrast, the transfer of EPA enforcement responsibilities from the Secretary of Labor to the EEOC, whether effected through the 1978 reorganization plan or the 1984 congressional ratification, has neither increased nor diminished the petitioner's obligation to comply with the EPA. See *Westinghouse,* 765 F.2d at 393.

3. Thus, the court of appeals' decision creates no conflict with other courts of appeals and is plainly correct. Moreover, the decision does not present an issue of continuing importance.[4] Petitioner does not dispute the EEOC's

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[4]Petitioner contends that the courts have experienced "turmoil" in distinguishing permissible from impermissible curative legislation, citing Justice White's dissent from the dismissal of an appeal in *Van Emmerik* v. *Janklow,* 454 U.S. 1131 (1982). Justice White concluded that the retroactive imposition of a utility tax raised a substantial

authority to enforce future EPA violations; instead, it only contests the agency's authority to litigate actions commenced prior to the the enactment of Public Law 98-532. There is no sound reason to require the Secretary of Labor, rather than the EEOC, to enforce the EPA during that period, particularly when Congress has unambiguously ratified the EEOC's past enforcement authority. Petitioner's arguments are unsound as a matter of law and policy and simply reflect an attempt to escape liability for past violations of the EPA.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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federal question, observing that this Court's prior cases have held that "adminstrative, procedural, and technical defects unrelated to the underlying policy may be remedied by curative legislation, while legislative policy may not be changed retroactively." *Id.* at 1133. The present case, involving the correction of a possible technical defect in the EEOC's enforcement authority, does not present the more troublesome issues of retroactive liability that prompted Justice White's dissent.